EDITOR'S NOTE

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No. .....

In The

Supreme Court of the United States

October Term, 1987

RITA L. MENDEZ,

Petitioner,

vs.

IGNACIO MENDEZ,

Respondent.

On Writ of Certiorari to the
Florida District Court of Appeal, Third District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First and Fourteenth Amendments to the Constitution of the United States prohibit a court from considering or relying upon the religious beliefs and practices of the parents in making a child custody determination where there is no evidence of any harm to the child resulting from such beliefs and practices?

2. Whether the First and Fourteenth Amendments to the Constitution of the United States permit a court to dictate the specific religious beliefs and practices to which a child may be exposed by one of her parents?

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The Petitioner, Rita L. Mendez, respectfully requests that a writ of certiorari issue to review the opinion of the Florida District Court of Appeal, Third District, rendered final on November 10, 1987.

THE OPINIONS OF THE COURTS BELOW

The Circuit Court of the Eleventh Judicial Circuit for Dade County, Florida, entered a Final Judgment awarding the custody of the parties' four year old daughter to the Respondent on November 4, 1985. (A1-6)

The Petitioner appealed to the Florida District Court of Appeal, Third District, which affirmed the judgment in

a two-to-one decision issued April 28, 1987, not yet reported. (A7-11)

The Petitioner timely sought rehearing and rehearing en banc as well as certification to the Supreme Court of Florida. The District Court of Appeal denied rehearing, rehearing en banc and certification in divided opinions, also not yet reported, rendered November 10, 1987. (A12-18)

JURISDICTION

The decision of the Florida District Court of Appeal, Third District, issued on April 28, 1987, was rendered final by the opinion denying rehearing and rehearing en banc on November 10, 1987.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). Because the decision of the Florida District Court of Appeal does not expressly and directly conflict with a decision of another district court of appeal of Florida and because the District Court of Appeal refused to certify the question to the Florida Supreme Court, the decision of the District Court of Appeal constitutes a decision of the highest court of Florida which could be had. Article V, Section 3(b)(3), Florida Constitution (1980); Rule 9.030(A)(2)(a)(iv), Florida Rules of Appellate Procedure.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Free Exercise of Religion and Establishment Clauses of the First Amendment and the Due Process Clause contained in Section One of the Fourteenth Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."
>
> U.S. CONSTITUTION
> amend. I

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> U.S. CONSTITUTION
> amend. XIV, § 1

STATEMENT OF THE CASE

1. The Evidence at Trial

The central issue of this child custody case was the religion of the child's mother, Rita Mendez, a Jehovah's Witness. The child's father, Ignacio Mendez, a Catholic, injected the issue of the mother's religion into the custody proceedings by his claim that being raised as a Jehovah's

Witness would not be in "the best interest" of the child. A two day child custody trial ensued.[1]

Rita and Ignacio Mendez were married in 1981. At the time of their marriage both considered themselves to be Catholic although neither practiced the religion. During their marriage they attended the Catholic church on a total of three occasions.

Rebecca Mendez, their child, was born six months after Rita and Ignacio married. Nearly one year after Rebecca's birth, Ignacio decided that the child should be baptized in the Catholic religion. Rita did not want Rebecca baptized but arranged for the baptism to please Ignacio. Ignacio did not concern himself with the arrangements.

In April, 1983, Rita became involved in the Jehovah's Witnesses faith. Ultimately she became a practicing member of that religion which resulted in the onset of marital difficulties between her and Ignacio. Ignacio did not believe in the doctrine of the Jehovah's Witnesses religion. He believed that Jehovah's Witnesses were "totally different" and "against society." He felt that his wife had "betrayed him" by her conversion and ordered her to cease attending Jehovah's Witnesses meetings. When Rita continued the pursuit of her religion Ignacio petitioned for dissolution of marriage and sought the custody of Rebecca.

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[1]The transcript of the divorce proceedings below comprises four volumes. Volumes One through Three concern the child custody issue and consist of a total of 485 pages. Volume Four deals with financial issues and is 45 pages in length. Of the 485 pages concerning child custody, 249 of those pages, or fifty-one percent of the transcript, contain references to the subject of religion.

At trial Ignacio testified that he was seeking custody of Rebecca because it was contrary to the best interest of the child to be raised as a Jehovah's Witness.

Two psychologists and one psychiatrist testified with respect to the best interests of Rebecca. All three mental health experts agreed that Rita was the preferred custodial parent, the child's primary caretaking parent and the parent with whom Rebecca had the deepest attachment. The court-appointed Guardian ad Litem shared the views of the three expert witnesses, describing the difference between a custodial decision in favor of Ignacio and one in favor of Rita, in terms of the effect upon the child, as:

> She [Rebecca] was either going to cease living with her father, which was going to be difficult for her, or she would cease living with her mother, which is going to be devastating for her. (A24)

Dr. Eli Levy, one of the psychologists, when asked whether a home comprised of Ignacio and his mother and sister would be an "adequate" environment for Rebecca in lieu of living with her mother, responded, "No, its like comparing an artificial heart with a real, healthy heart." He added, "[T]here is no substitute for the relationship, the emotional relationship that exists between Mrs. Mendez and her daughter." (A23)

The experts did not consider Ignacio to be a suitable alternative to Rita as a custodial parent for Rebecca. Ignacio had made no plans to care for the child. He testified that if he were awarded custody he would either hire a live-in maid or move to his mother's home and live there with Rebecca and his sister and her two children so that

either his mother, his sister or the maid could care for Rebecca.

Dr. Levy testified that he could not recommend that Ignacio be made the custodial parent of Rebecca for two reasons:

> One is the emotional state between the mother and the child. That needs to be taken care of and guarded. Secondly, my understanding of Mr. Ignacio's work, the man has to go to work and it requires travel at times out of the city. I think that under these circumstances, I feel that you are doing two things, safeguarding what is already been working and been proven to be healthy; that is the relationship between Mrs. Mendez and her daughter, and I don't feel he can provide for her, the day in and day out caring and attentiveness, that I think exists between her and her mother. (A21)

There was no difference of opinion among the two psychologists and the psychiatrist as to which parent should be awarded the custody of Rebecca; all three mental health experts concluded that it was in the best interest of Rebecca that her primary physical residence be with Rita. Even Ignacio believed that Rebecca belonged with Rita because of the child's deep attachment to her. Each of the expert custody recommendations, however, was conditional—conditioned upon Rita Mendez giving up the Jehovah's Witnesses religion, at least as it pertained to her child.

Each of the experts and the Guardian ad Litem, were troubled by the "problem" of Rita's religion. The "problem", as each testified, was that Jehovah's Witnesses are, in the words of one of the psychologists, "different"; and

in the words of the second psychologist, "deviates" and "not mainstream."

Dr. Richard Greenbaum, the second psychologist, speculated upon the "difficulties" that four year old Rebecca might face in the future if she were a Jehovah's Witness attending school with non-Jehovah's Witness children because Jehovah's Witnesses do not celebrate holidays or salute the flag:

> [A]s a Jehovah's Witness she [Rebecca] would have difficulty in dealing with the different values as they apply socially, in terms of school and religious holidays, which are not perceived as religious, exclusively by the children, such as Christmas and in terms of saluting the flag and things of that nature. (A19)

Dr. Eli Levy worried that Rebecca, who had no physical ailments, might some day need a blood transfusion and concluded that he "did not want to be a party" to such a "crisis":

> On one hand I saw Rebecca extremely attached to her mother. Her mother was the nurturing mother. She was the person taking care of her, attending to her physical and psychological needs on a daily basis. The child picked up the mother doll and played with it and she put her hand in the hand of her mother, setting up the family from the psychological perspective and where she was at. (A19)
>
> • • •
>
> What I am suggesting, looking at the children and looking where they are at, I am suggesting that the problem I was having is looking at that and recognizing the attachment between the child and the moth-

> er. I have recommended to the Court shared parental responsibility, but primary residential custody given to the mother, and I have a problem with that. The problem I am having is that the child's physical safety—I am not feeling comfortable with what happens in case of a crisis where the child would need a blood transfusion. I do not want to be a party to it. (A20)

Despite their reservations about Ignacio, each of the experts testified that it would be "better" for Rebecca to be a Catholic and, therefore, raised by Ignacio and members of his family, because Jehovah's Witnesses are not part of the "mainstream of western society":

> DR. LEVY: Living in this society, she [Rebecca] needs to adapt herself to the mainstream of culture. She is growing up and it is not a country of Jehovah's Witnesses. If the majority of the country was Jehovah's Witness, we would not have any problem, except for physically, but, as far as—I am not making the statement because she is a Jehovah's Witness, per se, but the philosophy of practicing the religion does not allow Rebecca to benefit and be safeguarded in living in this culture. (A21-22)
>
> • • •
>
> I believe that being raised a Jehovah's Witness would not be in the best interest of the child, given the fact that the principles, the way I understand them, do not fit in the western way of life in this society. (A22)
>
> • • •
>
> Q: You think it is unhealthy for a child to be a Jehovah's Witness in this culture?
>
> A: I say it is unhealthy for this child to be raised as a Jehovah's Witness.

Q: Because she would not fit in the mainstream of society?

A: Yes. (A22)

Each of the experts stated that Rita Mendez should be awarded custody of Rebecca provided that she would agree that the child be raised as a Catholic, in the "mainstream of society":

Q: Assuming, hypothetically, that the mother could not do that and would insist on bringing the Jehovah's religion into the child's life. What would your opinion be?

DR. GREENFIELD [the psychiatrist]: That the child should be with the father and have adequate sustained nurturing and input from the mother.

Q: Exclusive of the Jehovah's Witness?

DR. GREENFIELD: Yes. (A22-23)

• • •

DR. LEVY: With the exception of residential custody, everything else I would suggest to the Court would be at the hands of Mr. Mendez, meaning as far as her religious upbringing, straightforward Catholic upbringing. Not that I am making which one is better, but living in the western society, the part and parcel of the emotional health is the ability of the individual to adapt to a particular culture. If any choice is to be made in terms of her, I think his [the Father's] position is quite sensible and rational and should be respected. Bringing her up Catholic would allow her to adapt to our society and have the freedom that Catholic children have in the society, rather than take the chance and possibility and create a definite state in raising her as a Jehovah's Witness. (A20)

• • •

Q: Besides the idea of the father raising Rebecca as a Catholic—my understanding from what you are saying, you think the father should be raising Rebecca as a Catholic. Is that it, because that is the mainstream of society?

DR. LEVY: He should be raising her in a religion that is part and parcel of the mainstream of society, yes. (A22)

* * *

GUARDIAN AD LITEM: I think the child should be a Catholic and must be in the custody of her father. (A24)

The testimony of the experts also made it quite clear that Rita had been told, in no uncertain terms that she must forego her religion or lose the custody of her child. The Guardian Ad Litem told the court:

[She] felt that if her child continued to reside with her, regardless of whether the child continued to be Catholic or not, that she would be it [sic] her obligation to continue to read the child Bible stories and to explain them according to her own faith. I pointed out very strongly that this might cause her to lose her child and that it would be devastating to the little girl not to live with her. (A24)

Dr. Greenfield, the psychiatrist, told the court that she had presented Rita with the same "choice":

Q: In your therapy with these people, did Mrs. Mendez ever understand if she continued on the same course that she could conceivably lose custody of the child? Did she understand that?

A: I said that directly to her. I don't know if she understood it because I believe her answer was she would place her faith in Jehovah. (A23)

Throughout the proceedings Rita was asked repeatedly whether she would permit Ignacio to make decisions regarding religious and medical matters pertaining to Rebecca if she were the parent with whom Rebecca resided. Rita testified over and over again that if the court so ordered, she would comply. The presiding elder of Rita's congregation explained that such compliance would be part of Rita's faith; because Jehovah's Witnesses believe that the husband is the head of the home, a Jehovah's Witness woman should "obey the husband and that is the position that the Bible gives to the woman."

Ignacio, who had called Drs. Greenbaum, Levy and Greenfield, also presented the testimony of a former baby-sitter concerning purported "sibling rivalry" and fights between Rebecca and her half-brother, Joel, Rita's son from a prior marriage.[2]

The custody proceedings ended on October 2, 1985, when the trial court determined that it was in the "best interest" of Rebecca that Ignacio be her custodial parent. The trial court's Final Judgment contains, in pertinent part, the following provisions:

> All decisions which effect critical medical, dental health and general welfare and rearing of the minor child are vested solely and exclusively within the discretion of the Husband, the remaining medical decisions shall be shared.
>
> All decisions which relate to the religious training, welfare, *religious* education and teaching are the duty

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[2]According to both Dr. Greenbaum and Dr. Greenfield, no such "sibling rivalry" or other incidents between the children had been reported to them by Ignacio in any of their sessions with him.

> and sole responsibility of the Husband. The Wife shall not expose or permit any other person to expose the minor child to any religious practices, attendances, teachings or events which are in any way inconsistent with the Catholic religion. Nor shall the Wife preclude the child from engaging in any activity which is permitted by the Catholic religion. . . . (A2-3)

2. The District Court of Appeal Decision

On April 28, 1987, the District Court of Appeal, Third District, affirmed the Final Judgment of the trial court. Two of the three judges on the panel concluded that the record did not demonstrate "that the trial court made the father the primary residential parent of the parties' minor child solely because the mother is a practicing Jehovah's Witness." The court went on to hold that it is the "right" of the trial court, in a child custody case, to consider, "the effect on the child caused by conflicting religious beliefs of the parents." The third member of the panel, Judge Natalie Baskin, wrote a strong dissent:

> [W]hat does emerge from the record is a demonstration of the expert's personal biases against the mother's religion. Their disdain for the mother's religion induced them to speculate as to the possibility of harm to the child in the future even though no evidence of harm existed. The trial court was obviously persuaded by their less-than objective considerations for removing the child from the custody of her natural mother, and its judgment should not stand. *Palmore v. Sidoti,* 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed. 2d 421 (1984). (A10)

3. The Opinion on Motion for Rehearing and Rehearing en Banc

On November 10, 1987, the District Court of Appeal, Third District, denied rehearing and rehearing en banc

in divided opinions. Four of the nine judges concluded, in a separately filed concurrence, that this case was nothing more than a "quite ordinary" child custody case. Three disagreed. Judge Baskin, joined by Judge Wilkie D. Ferguson, Jr., wrote:

> To be forced to choose between one's religion and one's child is repugnant to a society based on constitutional principles. The soft voice of the minority should be audible to a responsible court sensitive to constitutional rights which include the right to practice an unpopular religion. (A17)

Chief Judge Alan R. Schwartz, without adopting any conclusion on the merits of the case, questioned, in a separately filed dissent, whether the original panel opinion constituted "a sound constitutional rule." (A18)

4. How the Federal Question was Raised

At the time of trial, Rita's counsel objected to the fact that the trial court refused to hear testimony about Catholicism and Ignacio's non-conforming religious practices but entertained testimony critical of Jehovah's Witnesses. The trial court expressly denied that it was declaring a preference for one religion over another.

On appeal, Rita argued that she "was denied the custody of her child because of her religious beliefs" and relied upon numerous decisions from various states holding that it is violative of the First and Fourteenth Amendments to the Constitution of the United States to base a decision to award custody of a child upon the religious beliefs of one of the parents.

The amicus curiae brief submitted in support of Rita's position by the American Civil Liberties Union Founda-

tion of Florida, Inc., argued that because the trial court's order expressed a preference for Ignacio's religion and forced Rita to choose between following the precepts of her religion and forfeiting her child or abandoning her religion in order to live with her child, it violated the Constitution.

The original three judge panel of the District Court of Appeal held that trial courts have the "right" to consider the "effect on the child caused by the conflicting religious beliefs of the parents." The court cited, as authority, *Rogers v. Rogers,* 490 So.2d 1017 (Fla. 1st DCA 1986), a decision of the Florida District Court of Appeal, First District, holding, without limitation, that "a parent's religious beliefs or values is one of several factors aiding [the trial court] in its child custody determination." (A8)

On motion for rehearing and rehearing en banc, Rita argued that permitting a trial court to "consider religious beliefs and values in a child custody case with no further limitation upon the circumstances under which such consideration may take place, is unconstitutional." Rita also filed a "Suggestion for Certification" to the Supreme Court of Florida, describing the issue in the case as "one of Constitutional proportions."

REASONS FOR ALLOWANCE OF THE WRIT

This case calls for the accommodation of important values embodied in the letter and spirit of the Constitution: protection of the freedom of religious beliefs and practices, protection of the freedom of personal choice in

matters of family life, and the judicious use by the state of its power to act in the best interests of a child involved in a custody dispute.

The increasing value placed upon religion in our present society coupled with the continued high rate of divorce has resulted in an expansion of requested judicial intervention into the once highly private area of religious beliefs and child rearing. The result has been substantial judicial confusion.

Nearly every state has decreed that child custody decisions are to be made in accordance with the "best interest" of the child. When the subject of religious beliefs is sought to be added to this "best interest" equation, however, all consensus is lost, and the decisions of the various states reflect a complete absence of a consistent Constitutional standard. Although the courts of nearly every state have held that religion may not constitute the sole basis upon which a parent may be denied the custody of a child, there is total disagreement concerning under what circumstances the courts may consider a parent's religious beliefs at all, even where recognizing that such factors cannot be solely determinative.

1. Conflict Among the States

There are two divergent lines of cases on the subject of whether the religious beliefs and practices of the parents may be a factor relied upon by the court in determining the "best interest" of the child in child custody cases. One line of authority places the religious beliefs of each parent among the several factors which the court may ordinarily and regularly consider in selecting the cus-

todial parent. The second line of cases holds that the religious beliefs of the parents may be judicially reviewed only under special circumstances. Within this second category, however, there is sharp disagreement concerning that which constitutes such special circumstances. The result of this split of authority is that whether an individual's religious beliefs and values will play a role in determining his or her fitness as a parent depends solely upon the state in which he or she resides.

States which adhere to the first line of authority and permit the consideration of the parents' religious beliefs as an ordinary factor in determining the "best interest" of the child include Arizona, *see Allison v. Ovens,* 4 Ariz. App. 496, 421 P.2d 929, 935 (1966), vacated on other grounds 102 Ariz. 520, 433 P.2d 968 (1967), cert. denied 390 U.S. 988, 88 S.Ct. 1184, 19 L.Ed.2d 1292 (1968) and (overruled on other grounds *Young v. Bach,* 107 Ariz. 180, 484 P.2d 176 (1971) (church and Sunday school attendance of children and parents may be considered as factors indicating "the concern which one of the parents may have regarding the moral climate in which the children are being reared")[3]; Florida, *see Rogers v. Rogers,* 490 So.2d 1017 (Fla. 1st DCA 1986) (court may "consider a parent's religious beliefs and practices as a factor in a custody de-

[3]Conflict appears to exist within the state. In *Smith v. Smith,* 90 Ariz. 190, 367 P.2d 230 (1961), the Supreme Court of Arizona held that the determination of fitness of a parent cannot be predicated upon the parent's religious beliefs. The *Allison* court held that *Smith* should not be read to preclude inquiry into religious beliefs. "We do not believe that the 1st and 14th Amendments to the United States Constitution . . . make church attendance a judicial secret in a child custody case". *Allison,* at 935.

termination"); Georgia, *see Stanton v. Stanton*, 213 Ga. 545, 100 S.E.2d 289, 293 (1957) (court may consider "the religious atmosphere in which the children will be reared"); Iowa, *see In Re Marriage of Moorhead*, 224 N.W.2d 242 (Iowa 1974) (court may consider significance attached to "religious education and training" by each parent); Kansas, *see Anhalt v. Fesler*, 6 Kan. App. 2d 921, 636 P.2d 224, 226 (1981) (religion and church attendance are "factors to be considered"); Louisiana, *see Cambre v. Cambre*, 372 So.2d 715, 717 (La.App. 4th Cir. 1979) (trial court properly considered testimony that father was "a good Catholic, attends weekly mass, has been generous with the church, and brings his children there on many occasions"); Maryland, *see Glick v. Glick*, 232 Md. 244, 192 A.2d 791, 793 (1963) (trial court may consider religious development, training and attendance)[4]; Missouri, *see In Re M.D.H.*, 595 S.W.2d 448, 450 (Mo. App. 1980) (court may base its custody determination on "steady church affiliation" as this relates to the child's best interest)[5]; Nebraska, *see Burnham v. Burnham*, 208 Neb. 498, 304 N.W.2d

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[4]The court found that the father "has been a frequent participant in religious services for a number of years, and his present wife joins him in this activity." The mother did not compare favorably, the court finding that she "has been rather infrequent in her religious participation," and did not join a congregation until after she initiated the proceedings before the trial court. *Glick*, at 793.

[5]Conflict also appears to exist within this state. In *Waites v. Waites*, 567 S.W.2d 326, 333 (Mo. 1978), the Supreme Court of Missouri held inquiry into religious beliefs per se is impermissible. The Court of Appeals in *M.D.H.* held that *Waites* does not proscribe "the reception and consideration of evidence of religious affiliation and activities of a custodian as the same pertains to the best interest of the child. A contrary view would blind the court to what is obviously one of the most important aspects of the child's prospective life." *M.D.H.*, at 450.

58, 61 (1981) (court must consider child's "spiritual welfare"); New Jersey, *see T. v. H.*, 102 N.J. Super. 38, 245 A.2d 221, 223 (1968), aff'd 110 N.J. Super. 8, 264 A.2d 244 (1970) (religious education "may become an important factor in deciding custody"); North Carolina, *see Dean v. Dean*, 32 N.C. App. 482, 232 S.E.2d 470, 471 (1977) (affirming trial court's modification of custody in part upon finding that mother's failure to take child to church and Sunday school was "jeopardizing his spiritual values"); New Hampshire, *see Provencal v. Provencal*, 122 N.H. 793, 451 A.2d 374, 378 (1982) (religion as it relates to "concerns and temporal welfare" of child is a proper subject of inquiry); Pennsylvania, *see In Re Custody of J.S.S.*, 298 Pa. Super. 428, 444 A.2d 1251, 1253 (1982) (a child's "spiritual well-being" is part of the best interest equation); and Washington, *see Schreifels v. Schreifels*, 47 Wash. 2d 409, 287 P.2d 1001, 1005 (1955) (fact that children were not "being given religious training in any denomination" should be considered).[6]

Illustrative of the reasoning of the first line of authority is *Morris v. Morris*, 271 Pa. Super. 19, 412 A.2d 139, 141 (1979):

> [W]e are convinced that embraced within the best interests concept is the stability and consistency of the child's spiritual inculcation. It would be an egregious error for our courts in a custody dispute to scrutinize the ability of parents to foster the child's emotional development, their capacity to provide adequate shel-

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[6]The court also noted that adultery "violates one of the Ten Commandments." *Schreifels*, at 1005. *But see In Re Marriage of Hadeen*, 27 Wash. App. 566, 619 P.2d 374 (1980), rev. den. 95 Wash. 2d 1009 (1981).

ter and sustenance, and their relative income, yet not review their respective religious beliefs.

The opinions of the second line of authority hold that the religious beliefs and practices of the parents may be considered as part of the "best interest" calculus only if there is a showing that such religious beliefs and practices are inimical to the child's general welfare. The showing that must be made and the standard that must be met before the court may review the religious beliefs of the parents are, however, subject to significant dispute. The cases range from the broad, generalized standard enunciated in *Clift v. Clift,* 346 So.2d 429, 435 (Ala. App. 1977), cert. denied *Ex parte Clift,* 346 So.2d 439 (Ala. 1977)—"questions concerning religious convictions, when reasonably related to the determination of whether the prospective custodian's convictions might result in physical or mental harm to the child, are proper considerations for the trial court in a child custody proceeding"—to the narrow focus of *Quiner v. Quiner,* 59 Cal. Rptr. 503, 516 (1967) (requiring a showing of "actual impairment of physical, emotional and mental wellbeing contrary to he best interest of the child" before the court may learn of the religious beliefs of the parties).

Between these poles lie the diverse attempts of the various states to formulate an appropriate standard. *See, e.g.,* California, *In re Marriage of Murga,* 103 Cal. App. 3d 498, 163 Cal. Rptr. 79 (1980); *accord, In re Marriage of Mentry,* 142 Cal. App. 3d 260, 190 Cal. Rptr. 843, 847 (1983) ("clear affirmative showing that religious activities will be harmful to the child"); Colorado, *see In Re Marriage of Short,* 698 P.2d 1310, 1313 (Colo. 1985) (con-

sideration of religion need not be restricted to actual or present harm or impairment but court may consider religious beliefs or practices which are "reasonably likely to cause present or future harm to the child"); Idaho, *see Compton v. Gilmore,* 98 Idaho 190, 560 P.2d 861, 863 (1977) (if religion is at issue there must be "a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child"); Maine, *see Osier v. Osier,* 410 A.2d 1027, 1030 (Me. 1980) (court may not consider a parent's religious beliefs and practices unless the child's well-being is "immediately and substantially endangered by the religious practice in question").

The gulf between the two lines of cases is enormous. For example, in the Pennsylvania decision of *Morris v. Morris,* 271 Pa. Super. 19, 412 A.2d 139, 142 (1979), the court noted:

> [I]t is beyond dispute that a young child reared into two inconsistent religious traditions will quite probably experience some deleterious physical or mental effects.

In contrast is the Massachusetts decision of *Felton v. Felton,* 383 Mass. 232, 418 N.E.2d 606, 607 (1981):

> The law, however, tolerates and even encourages up to a point the child's exposure to the religious influences of both parents although they are divided in their faiths . . . and it is suggested, sometimes that a diversity of religious experience is itself a sound stimulant for a child.[7]

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[7]*And see Smith v. Smith,* 90 Ariz. 190, 367 P.2d 230, 233 (1961) ("We are not unaware that deviation from the normal often brings ridicule and criticism. We reject, however, the no-

(Continued on following page)

The clear conflict among the states requires resolution by this court.[8] This Court has previously drawn a line across which no state may venture by prohibiting the consideration of factors such as race and marital status in child custody cases. *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed. 2d 421 (1984); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972). An individual's choice of faith cannot be held to a lesser standard.

2. Religion as a Factor in Child Custody Disputes

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism,

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tion that it is necessarily the basis for implanting neuroses. Criticism is the crucible in which character is tested. Conformity stifles the intellect fathering decadency. New ideas are the rungs upon which mankind supports itself in the long climb to perfection. It is sufficient to say until then, man's personality is not to be warped into a universal mold. A judgment supported only by the tenuous threads of a possible neuroses derived from deviation in normal activities will not withstand the thrust of constitutional guarantees").

[8]This conflict has been the subject of extensive legal commentary. *See*, e.g., Mangrum, *Exclusive Reliance on Best Interest May be Unconstitutional: Religion as a Factor in Child Custody Cases*, 15 Creighton L. Rev. 25, 26 (1981) (terming the decision in *Burnham v. Burnham*, 208 Neb. 498, 304 N.W.2d 58 (1981) an "unconstitutional subjection of the parental rights of the mother to the prejudices of the supreme court justices justified vaguely by the "best interests" standard); Comment, *Child Custody: Best Interests of Children v. Constitutional Rights of Parents*, 81 Dick L. Rev. 733, 739 (1977) (characterizing the custody court's ability to consider a parent's exercise of religion and make a custody decision upon that basis even though the parent's exercise of his or her religion would be constitutionally protected in any other context as a "flagrant abuse of the court's power, and a clear infringement of parents' rights").

religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[9]

It cannot be disputed that the state possesses substantial regulatory authority in the field of domestic relations. *Simms v. Simms*, 175 U.S. 162, 20 S.Ct. 58, 44 L.Ed. 115 (1899). The state has a concomitant duty to protect the welfare of minor children. Thus, where it is shown that a parent's religious practices endanger a child's emotional health or physical well-being, the state has a compelling interest in safeguarding the child, and the First Amendment does not bar the court from considering religious practices in such cases.

Under the line of cases holding that religion is but one of the several factors which courts may consider in child custody cases, however, there are no threshold requirements to be met before the court may review each of the parents' religious beliefs and values. The trial courts are simply empowered to "consider" the religious beliefs and values of the parties as an aspect of determining the "best interest of the child."

There are several dangers inherent in the judicial use of religion as a factor in child custody cases. First, custody cases are particularly susceptible to abuse, as trial judges have wide discretion. The "best interest" standard is, at best, imprecise. When religion is considered as one of the best interest factors, judicial discretion "can all too easily mutate into prejudice."[10] Because a custody de-

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[9]*West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

[10]Note, *Divorce: Restricting Religious Activity During Visitation*, 38 Okla. L. Rev. 284, 286 (1985).

cision will not be reversed on appeal absent a clear showing of an abuse of discretion, "a judge might draft a custody order to promote one religious belief over another and hide his motivation within the wide discretion afforded him by the 'best interest' standard."[11]

The major difficulty with the decisions, however, is that presuming that a child's interests would be best served by religious training or observances does not serve a secular legislative purpose; it has as its principle effect the advancement of religion; and it excessively entangles the state in deliberations about the value of different religious or nonreligious beliefs and practices. As such, these cases are clearly violative of the First and Fourteenth Amendments.[12]

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[11]Note, *The Religious Upbringing of Children After Divorce,* 56 Notre Dame Law. 160, 165 (Oct. 1980). *And see* Comment, *Child Custody: Best Interests of Children vs. Constitutional Rights of Parents,* 81 Dick L. Rev. 733, 735 (1979)— "[T]he [best interest] doctrine has been used not as a guide to arrive at a decision, but rather as a phrase ready-made to justify the court's delving into virtually any area of the parents' lives, and to support any conclusion it finally draws."

[12]This Court has reviewed laws favoring religion over nonreligion under the tripartite test articulated in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The *Lemon* test is the correct way to analyze religious preferences in child custody cases as did the Supreme Court of Alaska in *Bonjour v. Bonjour,* 592 P.2d 1233 (Alaska 1979). The *Lemon* test requires: (1) that the statute have a secular legislative purpose; (2) that its principal or primary effect neither advance or inhibit religion; and, (3) that the statute not foster "an excessive government entanglement with religion." Consideration of religion for the purpose of promoting a child's "spiritual welfare" fails the secular purpose requirement of *Lemon.* A judicial preference for religious parents fails the second part of the *Lemon* test by directly and immediately advancing religion

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The second line of cases, those holding that religion may be considered only where special circumstances exist, present a different problem: their lack of consistency. The simple accident of geography is the determinor of whether the definition of such "special circumstances" will be as nebulous as "possible future harm" or as restrictive as "actual impairment."

In order to accommodate the competing interest of parens patraie and personal liberty, a standard is required which will protect children before the court while insuring against the use of the "best interest" test as a cloak for religious prejudice. Such a standard was enunciated by the Supreme Court of Maine in *Osier v. Osier,* 410 A.2d 1027 (Me. 1980). The *Osier* test requires that the trial court make a preliminary determination in the child's best interest of the preferred custodial parent without consideration of either parent's religious practices. If the preferred parent is the one whose religious practices are in issue, the court may then take into account the consequences upon the child of that parent's religious practices using a two-part analysis:

> [F]irst, in order to assure itself that there exists a factual situation necessitating such infringement, the court must make a threshold factual determination that the child's temporal well-being is immediately and substantially endangered by the religious practice in

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Lastly, evaluating the relative merits of the parent's religious sentiments impermissibly entangles the state with religion. *Accord* Comment, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation,* 82 Mich. L. Rev. 1702 (1984).

question and, if that threshold determination is made, second, the court must engage in a deliberate and articulated balancing of the conflicting interests involved, to the end that its custody order makes the least possible infringement upon the parent's liberty interests consistent with the child's well-being. In carrying out that two-stage analysis, the trial court should make, on the basis of record evidence, specific findings of fact concerning its evaluation of all relevant considerations bearing upon its ultimate custody order. (*Id.* at 1030)

3. Religion as the Determinative Factor in this Case

In this case the Florida District Court of Appeal chose to align itself with the series of cases holding that the religious beliefs and practices of the parents is an ordinary factor which the courts may consider in determining the best interest of the child in a child custody case. That ruling, in and of itself, is unconstitutional.[13]

On the surface, however, the opinion appears to fall within the holdings of those cases requiring a showing of special circumstances in order to consider religion because the District Court made an oblique reference to the trial court having considered "the effect on the child caused by the conflicting religious beliefs of the parents." Such a purported standard, however, is nothing more than a judicial excuse for considering religious beliefs under the guise of the "best interest of the child." This is so because in

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[13]The District Court so aligned itself by citing as authority for its decision the case of *Rogers v. Rogers,* 490 So.2d 1017 (Fla. 1st DCA 1986), which holds that "a parent's religious beliefs or values is one of several factors aiding [the court] in its child custody determination."

order for the court to utilize, as a factor in determining a parent's fitness for the custody of a child, the "effect" on the child of "conflicting" religious beliefs, the court necessarily must determine which belief "caused" the conflict.[14]

Under any analysis it is clear that Rita's fundamental liberty interests were violated. Because this case was decided upon the basis that the courts have a "right" to hear evidence of a parent's religious beliefs in determining child custody, the judgment of the court is *prima facie* unconstitutional.

Had this case been decided in accordance with those cases enunciating a standard for the inclusion of religious beliefs in child custody matters, it would nevertheless have failed to pass constitutional muster. An examination of the record discloses no testimony of Rita's religious beliefs and practices sufficient to meet any evidentiary standard. Rita had converted to the Jehovah's Witness religion in April, 1983, when Rebecca was one and one half years old. Rebecca lived with her Catholic father and Jehovah's Witness mother for two years thereafter until the dissolution of marriage proceedings ended. Ignacio commenced taking Rebecca to the Catholic church simultaneously with the onset of the divorce proceedings and Rita continued to practice her religion. Nevertheless, the parties maintained a residence together and the child, de-

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[14]In this case Rita converted to the Jehovah's Witnesses faith. Ignacio objected. If Ignacio had not objected there would have been no "conflict." Is, then, Ignacio to be "blamed" for any "effect" upon Rebecca cause by "conflict" or is Rita to be "blamed" for converting? How is the court to decide who is "at fault" for the conflict without deciding either that Ignacio was "right" to object or that Rita was "right" to convert?

spite at least two years of exposure to differing religions, was found by both psychologists who examined her to "exhibit normal behavior."[15]

Not only was there no evidence of any harm to the child as a result of Rita's religious beliefs but, more importantly, all of the experts who testified at trial agreed that Rita was the preferred custodial parent. What, then, caused Rita to lose the custody of her child? The answer is: her faith and the private biases of the experts who the trial judge found persuasive.[16] "Deprivation of the custody of a child is not a 'slender' . . . punishment: it is a heavy penalty to pay for the exercise of a religious belief . . . . " *Quiner v. Quiner*, 59 Cal. Rptr. 503, 517 (1967).

4. Judicially Decreed Religious Exposure

> The Wife shall not expose or permit any other person to expose the minor child to any religious practices, attendances, teachings or events which are in any way inconsistent with the Catholic religion.

The above provision of the trial court's Final Judgment was affirmed by the Florida District Court of Appeal

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[15]Dr. Levy testified that both he and Dr. Greenbaum were "in agreement" that Rebecca was emotionally healthy. Dr. Levy stated that "Rebecca seems to exhibit a normal behavior. I could not foresee any serious pathology within the young woman. . . . There was no serious evidence of any hard anxiety or withdrawal or depressed tendencies." (A19)

[16]The trial judge expressly stated that he was persuaded by the testimony of Dr. Levy, the expert who testified that "Jehovah's Witness people, their way of life does not correspond and fit the western society in which we live", and that Jehovah's Witnesses "are not within the mainstream of culture . . . they are deviates." (A24; A19; A23)

in an opinion finding that the trial court "conscientiously avoided any interference with the right of the [Wife] to practice her religion." Despite the District Court's protestations, the limitations imposed upon the Wife not only interfere with her free exercise of religion, but violate the Establishment Clause of the First Amendment, as well.

The Free Exercise Clause is violated when state action is shown to have a coercive effect on an individual in the practice of his or her religion by denying or placing conditions upon a benefit or privilege. *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). Rita's right to contact and access with her child is implicated by these restrictions.[17] The trial court's order places Rita in the anomalous position of having a constitutionally protected right to speak to total strangers about religion but not to her own child.

The Final Judgment also places the imprimatur of the state judiciary upon the beliefs and practices of the Catholic religion. Because the primary purpose and effect of the Final Judgment is to foster Ignacio's religion over Rita's, it violates the absolute prohibition of the Establishment Clause. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

This Court cannot eliminate religious bigotry in America but it can and should review this decision which has de-

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[17]The Final Judgment is so restrictive that Rita would be in violation of the court order if she were to allow her child to watch Sunday morning religious television programs or to in any way allow her child to hear, read or learn about Buddhism, Islam, Judiasm, Hinduism, Protestantism, any other of the world's religions or, for that matter, agnosticism or atheism.

prived a parent of her child because of intolerance of her faith.

> We can but reflect that if government through its courts can lawfully place the individual in the extreme of choosing between the active practice of a religious belief or suffering a burdensome loss, whether liberty, property or a child's association, what profit the people of this nation from thousands of years of bigotry and intolerance? *Smith v. Smith,* 90 Ariz. 190, 367 P.2d 230, 233 (Ariz. 1961).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a writ of certiorari should issue to review the judgment of the Florida District Court of Appeal, Third District.

Respectfully submitted,

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January 1988

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

FAMILY DIVISION

CASE NO. 84-34049 FC-25

IN RE: THE MARRIAGE OF IGNACIO N. MENDEZ, Petitioner-Husband, and RITA L. MENDEZ, Respondent-Wife.	FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

THIS CAUSE was before the Court for final hearing on Thursday, September 26, 1985, and Thursday, October 10, 1985, solely on the issue of determination of the residential parent for the three and one-half (3½) year old minor daughter of the parties, REBECCA LISSETTE MENDEZ. While the Court has made its findings, recommendations and ruling with respect to the rearing and parental responsibility of the minor child, the parties themselves, following announcement of the Court's ruling on the Husband being selected as the residential parent of the minor child, settled all financial and property issues. Accordingly, it is

ADJUDGED:

1. *DISSOLUTION OF THE MARRIAGE*: The marriage between the parties is dissolved because it is irretrievably broken.

2. *SHARED PARENTAL RESPONSIBILITY*: Both the Husband and the Wife are fit and proper residential parents and shall have shared parental responsibility of the minor child, REBECCA LISSETTE MENDEZ, in accordance with Florida Law. After giving very careful consideration to the voluminous and conflicting testimony presented in this cause and having further considered the arguments of counsel and the recommendations of the guardian ad litem, the Court orders the following allocation of duties and responsibilities with respect to the minor child:

A) The Husband shall be the residential parent.

B) The Wife shall have regular, frequent and liberal visitation, access and contact with the minor child.

C) The Husband shall provide and pay for all the child's material needs, including shelter, food, clothing, major medical health insurance and medical, dental and orthodontal care.

D) All decisions which effect critical medical, dental, health and general physical welfare and rearing of the minor child are vested solely and exclusively within the discretion of the Husband, the remaining medical decisions shall be shared.

E) All decisions which relate to the religious training, welfare, *religious* education and teachings are the duty and sole responsibility of the Husband. The Wife shall not expose or permit any other person to expose the minor child to any religious practices, attendances, teachings or events which are in any way inconsistent with the religious teachings and practices of the Catholic religion. Nor shall

the Wife preclude the child from engaging in any activity which is permitted by the Catholic religion. The Court notes that both parties baptized the child in the Catholic religion at an early age in her life; and, all experts who testified before the Court concluded that it would be in the best interest of the child to continue to be reared in the one religion in which she was baptized by both parties. Any private schooling or other educational expense selected by the Husband shall be his expense.

F) Based upon the agreement of the parties, visitation shall be liberal and frequent and shall include:

i) The Wife will pick the child up each day after school and return the child to the Husband's residence no later than 6:30 P.M. on Tuesday and Thursday of each week.

ii) On Monday and Wednesday of each week, the child will remain with the Wife through the dinner hour, the Wife will provide the child with dinner and return the child to the Husband's residence one (1) hour prior to her regular bedtime.

iii) On alternating weekends, the child shall spend Friday and Saturday evenings at the Wife's residence and the Husband will pick the child up from the Wife's residence on Sunday morning, at a mutually convenient time. On the other alternating weekends, the minor child shall be with the Husband on Friday evening, no later than 6:30 P.M. and have dinner with the Husband. The Wife shall pick the child up on Saturday morning and be with the child until Sunday morning, when she shall be picked up by the Husband.

iv) All school vacation periods shall be evenly divided by the parties. Neither party shall make any disparaging remarks about the other in the presence of the child or permit any other person to do so.

3. *NON-MODIFIABLE REHABILITATIVE ALIMONY FOR THE WIFE:*

A) The Husband has agreed to pay to the Wife rehabilitative alimony, to terminate upon the death of the Wife as follows:

i) The sum of Nine Thousand Five Hundred Dollars ($9,500.00) shall be paid on or before November 21, 1985.

ii) The sum of Nine Thousand Five Hundred Dollars ($9,500.00) shall be paid on or before March 1, 1986.

iii) The sum of Nine Thousand Five Hundred Dollars ($9,500.00) shall be paid on or before January 1, 1987.

iv) The sum of Nine Thousand Dollars ($9,000.00) shall be paid on or before January 1, 1988.

B) It is understood and agreed that the rehabilitative alimony shall be income to the Wife and tax deductible to the Husband.

C) The Wife specifically waives any right she may have to apply for modification of the rehabilitative alimony.

D) The Court does not retain jurisdiction on the issue and agreement reached by the parties with respect to payment of alimony.

4. *PERSONAL PROPERTY:* The furniture, furnishings, fixtures, appliances and all personalty, together with the leasehold rights at the former marital residence located at 8081 S. W. 9th Terrace, Miami, Florida, shall be the Wife's property.

5. *ASSETS:* The assets listed on the respective financial affidavits of the parties shall belong to each party, respectively.

6. *LIFE INSURANCE:* The Husband agrees to provide the Wife with proof, within thirty (30) days of the entry of this Final Judgment of Dissolution of Marriage, of the existence of a life insurance policy on his life, on which policy the Wife shall be listed as beneficiary, in the total principal of the alimony payments required to be made in the sum of Thirty-Seven Thousand Five Hundred Dollars ($37,500.00) as provided in paragraph number three (3) above. The principal amount of the life insurance policy may decrease as the Husband's alimony obligation decreases. The Husband shall pay the premiums on the policy.

7. *WIFE'S AUTOMOBILE:* The 1977 Chevrolet Caprice automobile shall be the property of the Wife.

8. *WIFE'S AUTOMOBILE INSURANCE:* The Husband shall pay for the Wife's automobile insurance through March of 1986, after which time it shall be the responsibility of the Wife.

9. *WIFE'S ATTORNEY'S FEES, SUIT MONIES AND COSTS:* The Husband agrees to pay reasonable attorney's fees to the Wife's counsel, MEAH ROTHMAN TELL, ESQUIRE, in the sum of Nine Thousand One

Hundred Ninety-Nine Dollars and Sixty-Eight Cents ($9,199.68) on or before November 8, 1985. The Husband also agrees to pay the statements and invoices submitted by Dr. Nancy Greenfield, Dr. Richard Greenbaum, Dr. Eli Levy, Sue Rose Samuels, Esquire, the guardian ad litem and all court reporters, interpreters and transcript expenses. The Husband shall pay his own attorney's fees, suit monies and costs, to MAURICE JAY KUTNER, P.A. The Court retains jurisdiction in accordance with Florida Law.

ORDERED at Miami, Dade County, Florida, this 4th day of November, 1985.

/s/ PHILLIP W. KNIGHT,
Judge, Circuit Court

Copies Furnished To:

MEAH ROTHMAN TELL, ESQUIRE
MAURICE JAY KUTNER, P.A.

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, 1987

RITA L. MENDEZ,	)	
	)	
Appellant,	)	
	)	CASE NO.
vs.	)	85-2807
	)	
IGNACIO N. MENDEZ,	)	
	)	
Appellee.	)	

Opinion filed April 28, 1987.

An appeal from the Circuit Court for Dade County, Phillip W. Knight, Judge.

Frumkes & Greene and Cynthia L. Greene, for appellant.

Maurice Jay Kutner, for appellee.

Robin H. Greene and Steven Forester, for American Civil Liberties Union Foundation of Florida, as amicus curiae.

Before HUBBART, BASKIN and DANIEL S. PEARSON, JJ.

PER CURIAM.

The record in this case does not support the appellant's contention that the trial court made the father the primary residential parent of the parties' minor child solely because the mother is a practicing Jehovah's Witness. Instead, the record reflects that the trial court, after considering the testimony of numerous experts, the parties and their relatives and friends, and a guardian ad litem appointed to represent the minor, considered, as it had a right to do, *Rogers v. Rogers,* 490 So.2d 1017 (Fla. 1st DCA 1986), the effect on the child caused by the conflicting religious beliefs of the parents and, in ruling, conscientiously avoided any interference with the right of the non-custodial parent to practice her religion and avoided the imposition on her of an obligation to enforce the religious beliefs of the father. Although the evidence is in conflict on the issue of whether the best interests of the child would be better served with the father or with the mother as primary residential parent, there is more than ample competent evidence to support the decision of the trial court in placing that responsibility upon the father and giving extensive visitation rights to the mother.

Affirmed.

HUBBART and DANIEL S. PEARSON, JJ., concur.

MENDEZ v. MENDEZ
CASE NO. 85-2807

BASKIN, Judge (dissenting).

Agreeing with the expert witnesses that shared parental responsibility would be detrimental to the child, the trial court declared the father the primary residential parent. In my view, the trial court's selection of the fa-

ther constituted an abuse of discretion. All three of the expert witnesses, two psychologists and one psychiatrist, concluded that the child belongs with the mother; one psychologist described a home with the father and the paternal grandmother as inferior to a home with the mother in the same way that "an artificial heart [compares] with a real, healthy heart." The expert witnesses observed that a "very safe, a very lovable [sic], healthy attachment" exists between the child and her mother, the "prime parent figure"; on the other hand, the father's work requires him to travel out of the city, curtailing his ability to provide the "day in and day out caring and attentiveness that . . . exists between [the child] and her mother." The court-appointed guardian ad litem shared the experts' views and was of the opinion that the child would be devastated if she were compelled to cease living with her mother.

The experts agreed, however, that contact with the mother's Jehovah's Witness religion is not in the best interest of the child, who needs "to adapt herself to the mainstream of culture." They stated that a Catholic upbringing "would allow her to adapt to society and have the freedom that Catholic children have in the society . . . ." In response, the mother testified that she would comply with a court order permitting the father to make all decisions regarding the child's religious education and medical welfare; she merely wished to read bible stories to her daughter and to explain her own beliefs when the child was mature enough to understand them. She testified:

> I know my husband does not agree with all of these things and, of course, my daughter can do a lot

> of things I would not do; but, that does not mean she cannot do them. She can do them, if my husband allows her to do those things, like saluting the flag and all of those things. My husband allows her and she can do it, but I would explain to her the reason why I don't do it, when she is old enough to understand. I would not want to confuse her or anything like that.

Nevertheless, with neither a finding that the best interests of the child require such a result, nor an explanation for rejecting the favored parent, the court ruled the father primary residential parent and precluded the mother from exposing the child to any religious practices, teachings, or events in any way inconsistent with the Catholic religion.

My finding that the trial court abused its discretion is based on a review of the record and its disclosure that the child, exposed to the religious views of both parents for two years, showed no evidence of emotional or psychological harm. What does emerge from the record is a demonstration of the experts' personal biases against the mother's religion. Their disdain for the mother's religion induced them to speculate as to the possibility of harm to the child in the future even though no evidence of harm existed. The trial court was obviously persuaded by their less-than-objective considerations for removing the child from the custody of her natural mother, and its judgment should not stand. *Palmore v. Sidoti,* 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984); *Waites v. Waites,* 567 S.W.2d 326, 333 (Mo. 1978) ("We hold that no judicial officer may determine child custody based on approval or disapproval of the beliefs, doctrine, or tenets of the religion of either parent or their interpretation thereof.");

Smith v. Smith, 90 Ariz. 190, 367 P.2d 230, 233 (1961) ("A judgment supported only by the tenuous threads of a possible neuroses [sic] derived from deviation in normal activities will not withstand the thrust of constitutional guarantees."). This court should require the trial court to rest its determination on evidence of harm rather than mere speculation of harm to the child. *See Felton v. Felton*, 383 Mass. 232, —, 418 N.E.2d 606, 607 (1981) ("[H]arm to the child from conflicting religious instructions or practices . . . should not be simply assumed or surmised; it must be demonstrated in detail."); *Munoz v. Munoz*, 79 Wash.2d 810, —, 489 P.2d 1133, 1135 (1971) ("[W]here the trial court does not follow the generally established rule of noninterference in religious matters in child custody cases without an affirmative showing of compelling reasons for such action . . . [it] is tantamount to a manifest abuse of discretion."); *In re Marriage of Hadeen*, 27 Wash.App. 566, —, 619 P.2d 374, 382 (1980) ("We hold that the requirement of a reasonable and substantial likelihood of immediate or future impairment best accommodates the general welfare of the child and the free exercise of religion by the parents.").

In the absence of a showing that the child's best interest requires the father to be made primary custodian, the trial court's decision is merely an expression of religious preference; its implementation of that view without adequate record support violates the mother's constitutional freedoms. I therefore decline to join the majority's affirmance. Under the facts of this case, I would reverse the trial court's custody determination and make the mother primary residential parent.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1987

RITA L. MENDEZ,	)	
	)	
Appellant,	)	
	)	CASE NO.
vs.	)	85-2807
	)	
IGNACIO N. MENDEZ,	)	
	)	
Appellee.	)	

Opinion filed November 10, 1987.

An Appeal from the Circuit Court for Dade County, Phillip W. Knight, Judge.

Frumkes & Greene and Cynthia L. Green, for appellant.

Maurice Jay Kutner, for appellee.

Robin H. Greene and Steven Forester, for American Civil Liberties Union Foundation of Florida, as amicus curiae.

ON MOTION FOR REHEARING

Before HUBBART, BASKIN and DANIEL S. PEARSON, JJ.

PER CURIAM.

The motion for rehearing is denied.

HUBBART and DANIEL J. PEARSON, JJ., concur. BASKIN, J., dissents.

ON MOTION FOR REHEARING EN BANC

Before SCHWARTZ, C.J., and BARKDULL, HENDRY, HUBBART, NESBITT, BASKIN, DANIEL S. PEARSON, FERGUSON and JORGENSON, JJ.

PER CURIAM.

The motion for rehearing en banc is denied.

BARKDULL, HENDRY, HUBBART, NESBITT, DANIEL S. PEARSON and JORGENSON, JJ., concur.

PEARSON, DANIEL, Judge, concurring in the denial of rehearing en banc.

If, as Judge Baskin's dissent suggests, the child custody issue in this case was decided on a preference for one religion over another, it is likely that we would all agree that the case would present a question of great public importance or a question of exceptional importance. But the child custody issue was not so decided, and, the rhetoric in the dissent aside, this case involves nothing more than the quite ordinary question of whether the trial court abused its discretion in resolving conflicting testimony unrelated to the religious practices of the partries about how the best interests of the child would be served.[1]

Although the denial of rehearing en banc reflects the considered conclusion that the trial court's decision was not based upon constitutionally impermissible grounds, it is worth observing that the mother never objected in

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[1] The record contains evidence, for example, that the child had difficulties beyond normal sibling rivalry with the mother's other child, an older stepbrother who resides with the mother; that the stepbrother may have been physically abusive towards the child; that the paternal grandmother was a good caretaker and the maternal grandmother was not; and that, to the child's detriment, the mother was absent from the house several nights each week.

the trial court to the evidence that she now says should not have been received and considered by the court; indeed, the mother was the very party who tried to make her religious practices the focal point of the dispute. The ordinary rules by which we operate—including one requiring that error be preserved for appellate review—are not suspended merely because the point on appeal is draped with the language of the First Amendment.

HUBBART, NESBITT and JORGENSON, JJ., concur.

CASE NO: 85-2807

MENDEZ v. MENDEZ
ON MOTION FOR REHEARING EN BANC AND MOTION TO CERTIFY QUESTION

BASKIN, Judge (dissenting).

By denying en banc review and refusing to certify the question, Fla. R. App. P. 9.331, 9.030(a)(2)(A)(v), the court announces that this case does not present issues of either great public importance or of exceptional importance. I disagree. In my view, religious issues permeated the trial and the majority's disregard of their importance does a disservice to the democratic system of jurisprudence.

Even though Dr. Greenbaum, Dr. Levy, Dr. Greenfield, and the guardian ad litem were all in agreement that the child should be with her mother, the experts advised the trial court to reject the mother as primary custodian and influenced the court to award custody to the father because, in their view, the mother's religion is considered by society as inferior to the father's religion. For example, during cross-examination, Dr. Levy stated:

A. . . . I believe that being raised a Jehovah's Witness would not be in the best interest of the child, given the fact that the principles, the way I understand them, do not fit in the western way of life in this society.

. . . .

The point I am making is that my recommendation, they can bring her up nonreligiously, but, where it comes to being raised as a Jehovah's Witness, I can see that becoming a block for her healthy development and healthy adaptation to this culture.

Q. You think it is unhealthy for a child to be a Jehovah's Witness in this culture?

A. I say it is unhealthy for this child to be raised as a Jehovah's Witness.

Q. Because she would not fit in the mainstream of society?

A. Yes.

No testimony contradicted the unanimous opinions of the doctors that the child should be with her mother, and no evidence demonstrated harm to the child from the parents' conflicting religious views. Thus, it is clear from the record that the mother's religious preference deprived her of her child.[1]

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[1] Surprisingly, Judge Pearson defends the majority view by asserting that appellant failed to preserve the issue under consideration; however, the original majority opinion was not based on a preservation question.

Mrs. Mendez preserved the issue. She complained that the trial court refused to hear testimony about Catholicism and the husband's non-conforming religious practices but entertained testimony critical of the Jehovah's Witness religion. The record demonstrates the trial court's limited focus and makes clear that the trial court decided custody, not on the parents' relative qualifications, but on their religious views.

Not only is there no reasonable ground for denying the mother custody, the presence in the record of religious biases raises serious questions which should permit this case to receive further review. Comments such as those offered by the experts, that it is "unhealthy for a child to be raised as a Jehovah's Witness" and that she "should be rais[ed] . . . in a religion that is part and parcel of the mainstream of society," should offend rather than persuade a court of law. *See, e.g., Waites v. Waites,* 567 S.W. 2d 326 (Mo. 1978); *Smith v. Smith,* 90 Ariz. 190, 367 P.2d 230 (1961); *Felton v. Felton,* 383 Mass. 232, 418 N.E.2d 606 (1981); *Munoz v. Munoz,* 79 Wash.2d 810, 489 P.2d 1133 (1971); *In re Marriage of Hadeen,* 27 Wash.App. 566, 619 P.2d 374 (1980). The court's own statements in the final order reveal that despite its protestations to the contrary, the ultimate decision resulted from the court's negative view of the wife's religion rather than from an unbiased evaluation of the child's best interests.

Rogers v. Rogers, 490 So.2d 1017 (Fla. 1st DCA 1986), relied on by the majority, holds that religion may be considered a factor in determining custody; however, even the *Rogers* court expressly refused to approve restrictions on the free expression of religion. Nevertheless, the trial court in its Final Judgment penalized the mother for her religion and, in addition, ordered:

> The Wife shall not expose or permit any other person to expose the minor child to any religious practices, attendances, teachings or events which are in any way inconsistent with the religious teachings and practices of the Catholic religion. Nor shall the Wife preclude the child from engaging in any activity which is permitted by the Catholic religion.

These restrictions highlight the trial court's disposition to favor the Catholic religion and to discount expert testimony that the child belonged with her mother.

To be forced to choose between one's religion and one's child is repugnant to a society based on constitutional principles. The soft voice of the minority should be audible to a responsible court sensitive to constitutional rights which include the right to practice an unpopular religion. The trial court's curtailment of first amendment rights should compel the court to recognize the presence of issues of great public importance and grant en banc relief, or, at a minimum, certify the following question as one of great public importance:

> Whether, and to what extent, may a trial court base its decision to award child custody on the religious beliefs and practices of one of the parents?

FERGUSON, J., concurs.

SCHWARTZ, Chief Judge (dissenting from denial of motion for rehearing en banc)

Without now adopting any conclusion on the merits, I believe that the record in this case presents a substantial question concerning the interplay between the best interests of the child in a custody case and a parent's religious practices of which the judge may personally disapprove or find distasteful. See Hausman, Religious Issues in Custody and Visitation: A Court's Dilemma, 1 Am.J.Fam.L. 325 (1987). The importance, indeed the constitutional necessity, of drawing an impenetrable line between the two factors in every case in which there is no demonstrable

harm to the child,[1] Brown v. Szakal, 212 N.J. Super 136, 514 A.2d 81 (1986); In re Marriage of Murga, 103 Cal.App. 3d 498, 163 Cal.Rptr. 79 (1980); Quiner v. Quiner, 59 Cal. Rptr. 503 (Ct. App. 1967), and the real possibility, as indicated in Judge Baskin's opinions, that the line was improperly crossed below, render it clearly apropriate that this case be determined en banc as one of great public importance.

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[1] This view is contrary to *Rogers v. Rogers*, 490 So.2d 1017, 1018 (Fla. 1st DCA 1986), which, I think wrongly, states—without reference to an adverse impact upon the child—that "the trial court [may] consider a parent's religious beliefs or values as one of several factors aiding in its child custody determination." (footnote omitted) That *Rogers* was cited with apparent approval in the panel opinion here provides further basis for the belief that the case indeed involved the religious issue in the trial court and that it may have been reviewed and affirmed here upon what I would hold is an incorrect standard of law. In any event, the reliance on *Rogers* speaks to the importance of this court's determining en banc whether the panel opinion embodies a constitutionally sound rule in this vital area.

EXCERPTS FROM TRIAL TRANSCRIPT SEPTEMBER 26, 1985

• • •

DR. GREENBAUM: She [Rebecca] interprets religion in terms of attachment to the parent and the essential concern is that of different parental values and the fact that as a Jehovah's Witness she would have difficulty in dealing with the different values as they apply socially, in terms of school and religious holidays, which are not perceived as religious, exclusively by the children, such as Christmas and in terms of saluting the flag and things of that nature. (Vol. 1, page 9).

• • •

DR. LEVY: I guess what stood in the way is the fact that Jehovah's Witness people, their way of life does not correspond and fit the western society in which we live. (Vol. 1, page 40).

• • •

DR. LEVY: Dr. Greenbaum and I are basically in agreement, if I recall his statement to me, that the child [Rebecca] is basically healthy. Rebecca seems to exhibit a normal behavior. I could not foresee any serious pathology within the young woman . . . [T]here was no serious evidence of any hard anxiety or withdrawal or depressed tendencies. (Vol. 1, page 41).

• • •

DR. LEVY: On one hand, I saw Rebecca extremely attached to her mother. Her mother was the nuturing mother. She was the person taking care of her, attending to her physical and psychological needs on a daily basis. The child picked up the mother doll and played with it and she put her hand in the hand of her mother, setting up the family from the psychological perspective and where she was at.

At this point, she is attached to her mother and her emotional state at this point states that Mrs. Mendez did an adequate job in raising her. She does not suffer from any emotional disorders.

What I am suggesting, looking at the children and looking where they are at, I am suggesting that the problem I was having is looking at that and recognizing the attachment between the child and the mother.

I have recommended to the court shared parental responsibility, but primary residential custody given to the mother, and I have a problem with that.

The problem I am having is that the child's physical safety—I am not feeling comfortable with what happens in case of a crisis where the child would need a blood transfusion. I do not want to be a party to it.

If I did not take that position, my suggestion to the court is that the primary residential custody would continue with Mrs. Mendez. This would assure the child the attachment that she developed with her.

The relationship between Rebecca and her father is extremely important, Your Honor. With the exception of residential custody, everything else I would suggest to the Court would be at the hands of Mr. Mendez, meaning as far as her religious upbringing, straightforward Catholic upbringing. Not that I am making which one is better, but living in the western society, the part and parcel of the emotional health is the ability of the individual to adapt to a particular culture.

If any choice is to be made in terms of her, I think his [the Father's] position is quite sensible and rational and should be respected. Bringing her up Catholic would allow her to adapt to our society and have the freedom that Catholic children have in the society, rather than take the chance and possibility and create a definite state in raising her as a Jehovah's Witness. (Vol. 1, pages 44-45).

* * *

DR. LEVY: The way I am envisioning it is the following: I am suggesting the child, from an emotional perspective, continue to be cared for by the mother, but anything else with the child's life, I believe we ought to let the child live in this culture and in the mainstream of society, in the western sense, and be able to expose her to all avenues and ways that the child should experience in the culture. (Vol. 1, page 46).

* * *

DR. LEVY: What is left with the mother is what is—is a very safe, a very lovable, healthy attachment that exists between the child and her mother and I would like to preserve it, if we can. (Vol. 1, page 48).

* * *

DR. LEVY: The question is why should I not recommend that he [the Father] should have total custody?

Q: I would take that.

DR. LEVY: One is the emotional state between the mother and the child. That needs to be taken care of and guarded.

Secondly, my understanding of Mr. Ignacio's work, the man has to go to work and it requires travel at times out of the city.

I think that under these circumstances, I feel that you are doing two things, safeguarding what is already been working and been proven to be healthy; that is the relationship between Mrs. Mendez and her daughter, and I don't feel he can provide for her, the day in and day out caring and attentiveness, that I think exists between her and her mother. (Vol. 1, page 49).

* * *

DR. LEVY: Living in this society, she [Rebecca] needs to adapt herself to the mainstream of culture. She is growing up and it is not a country of Jehovah's Witnesses.

If the majority of the country was Jehovah's Witness, we would not have any problem, except for physically, but, as far as—I am not making the statement because she is a Jehovah's Witness, per se, but the philosophy of practicing the religion does not allow Rebecca to benefit and be safeguarded in living in this culture. (Vol. 1, page 56).

* * *

Q: Besides the idea of the father raising Rebecca as a Catholic—my understanding from what you are saying, you think the father should be raising Rebecca as a Catholic. Is that it, because that is the mainstream of society?

DR. LEVY: He should be raising her in a religion that is part and parcel of the mainstream of society, yes. (Vol. 1, page 62).

* * *

DR. LEVY: I believe that being raised a Jehovah's Witness would not be in the best interest of the child, given the fact that the principles, the way I understand them, do not fit in the western way of life in this society. (Vol. I, page 63)

* * *

Q: You think it is unhealthy for a child to be a Jehovah's Witness in this culture?

DR. LEVY: I say is is unhealthy for this child to be raised as a Jehovah's Witness.

Q: Because she would not fit in the mainstream of society?

DR. LEVY: Yes. (Vol. I, page 63)

* * *

Q: Assuming, hypothetically, that the mother could not do that and would insist on bringing the Jehovah's religion into the child's life. What would your opinion be?

DR. GREENFIELD: That the child should be with the father and have adequate, sustained nurturing and input from the mother.

Q: Exclusive of the Jehovah's Witness?

DR. GREENFIELD: Yes. (Vol. 1, page 71).

* * *

Q: In your therapy with these people, did Mrs. Mendez ever understand if she continued on the same course that she could conceivably lose custody of the child? Did she understand that?

DR. GREENFIELD: I said that directly to her. I don't know if she understood it because I believe her answer was she would place her faith in Jehovah. (Vol. 1, page 87).

* * *

Q: The other thing is you see the Jehovah's Witnesses as being, quote, unquote, deviates? I think you used that word?

DR. LEVY: Not in a bad sense. They are not within the mainstream of culture. Yes, from that prospect, yes, they are deviates. (Vol. 2, page 302).

* * *

Q: Do you know anything about the proposed environment to which he is suggesting Rebecca be placed?

DR. LEVY: It is my understanding—[Husband's counsel] asked me the question if his sister and mother—if that would be an adequate environment, and my response was, if I remember correctly—I said, no, it is like comparing an artificial heart with a real, healthy heart. (Vol. 2, page 305)

EXCERPTS FROM TRIAL TRANSCRIPT OCTOBER 2, 1985

* * *

GUARDIAN AD LITEM: She [Rebecca] was either going to cease living with her father, which was going to be difficult for her, or she would cease living with her mother, which is going to be devastating for her. (Vol. 3, pages 173-174).

* * *

GUARDIAN AD LITEM: [She] felt that if her child continued to reside with her, regardless of whether the child continued to be Catholic or not, that she would be it [sic] her obligation to continue to read the child Bible stories and to explain them according to her own faith. I pointed out very strongly that this might cause her to lose her child and that it would be devastating to the little girl not to live with her. (Vol. 3, pages 174-175).

* * *

GUARDIAN AD LITEM: I think the child should be Catholic and must be in the custody of her father. (Vol. 3, page 176).

* * *

THE COURT: The Court has considered carefully the testimony of all persons, both laypersons and expert witnesses, and is given [sic] credence where the Court feels credence is due and disregarding [sic] certain portions of both lay and expert [sic] as voiced here.

I have been persuaded in hearing part [sic] by the testimony of Dr. Levy and options [sic] the Court's finding in his opinions in this matter, accept his opinions to residential custody based primarily upon his candid and honest answer to the cross examination in question, [sic] have you ever seen such a system work, and his answer was candidly, no.

The Court feels, as Dr. Levy's candid opinion, [sic] could not or would not work in a decision at hand. [sic].

I also considered great weight [sic] to the testimony of Dr. Greenfield and find this buttress [sic] by the testimony of the mother and "expert" belief [sic]. Mr. Miller, the elder in the church, and views advanced in the spouse [sic] by guardian ad litem by the Court has been appointed [sic] to act as a totally independent arm. [sic] The Court representing the best interest of the child. [sic]

Therefore, the Court is compelled as a conclusion of law findings [sic] to the best interest of the child that the child be raised with the residential custody in the part of the husband. The Court finds it be [sic] detrimental to the child's best interest and the child to have shared parental responsibility in areas of religious upbringing and in the areas of medical decisions involving critical medical care. Including but not limited to blood transfusions. Thus, the Court is compelled to follow the laws of the State of Florida and render those exclusive rights as being reposed with the husband. (Vol. 3, pages 183-184)

No. 87-1166

In The
Supreme Court of the United States
October Term, 1987

RITA L. MENDEZ,

Petitioner,

vs.

IGNACIO MENDEZ,

Respondent.

On Writ of Certiorari to the
Florida District Court of Appeal, Third District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Whether the decisions rendered at the Trial and Appellate levels were grounded upon state law, conflicting facts and the best interests of a minor child, having no relationship to any federal or constitutional question?

2. Whether the Petitioner raised and preserved a constitutional question when neither the pleadings at the trial level nor the question presented to the Appellate Court mentioned the constitution?

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[1]Respondent wishes to state the Questions Presented differently from those which have been presented by Petitioner.

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OPINIONS BELOW

Respondent agrees with Petitioner's summary of the opinions below, with the exception that the Trial Court awarded shared parental responsibility, directing that the Respondent serve as the residential parent. He was not awarded "custody" (see Petitioner's Appendix, A-2).

JURISDICTION

The Petitioner improvidently and erroneously attempts to invoke the jurisdiction of this Court.

The failure of Petitioner to specifically raise and preserve the now alleged constitutional[2] questions in the Florida Courts has apparently placed her in the *untenable* position of arguing that the decision below was rendered by " . . . the highest Court of Florida which could be had" (Petitioner's brief, at page 2).

However, *Rule* 9.030(a)(2)(ii) of the Rules of Appellate Procedure of the State of Florida, specifically provides that the jurisdiction of the Supreme Court of Florida could be invoked when the decision of the Appellate Court "expressly construe[s] a provision of the State or Federal Constitution." Petitioner never presented the now alleged constitutional question to a Florida Court.

Thus, since Petitioner waived her right to apply to the Florida Supreme Court; *a fortiori*, there is no jurisdiction in this Court.

———o———

STATEMENT OF THE CASE

Petitioner's summary of the facts and proceedings is incomplete. There was substantial, voluminous and impressive testimony presented to the Trial Court with respect to the parenting abilities of the father.

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[2]The Petitioner attempts to assert what she claims as her constitutional rights as opposed to what is in the best interests of her daughter.

The case tried in the State of Florida was nothing more or less than the presentation and resolution of a factual dispute with respect to what living and rearing situation would represent the best interests of the minor child, REBECCA MENDEZ. This conclusion is illustrated and punctuated by a cursory examination of the argument presented by Petitioner in the Court below, when she contended that:

"THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING THE PRIMARY PHYSICAL RESIDENCE OF THE PARTIES' MINOR CHILD TO THE HUSBAND."

Similarly, the Respondent's argument in opposition was:

"WHEN THERE IS COMPETENT EVIDENCE, ALBEIT CONFLICTING, ON THE ISSUE OF THE SELECTION OF A PRIMARY RESIDENTIAL PARENT IN A DISSOLUTION OF MARRIAGE PROCEEDING, AN APPELLATE COURT MAY NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE TRIAL COURT."

The most accurate and by far the most concise summary of the issues which were presented and determined below are set forth in the concurring opinion of the Honorable Daniel Pearson, Judge, District Court of Appeal of Florida, Third District, in his concurring opinion denying rehearing en banc (see page A-13-14 of Petitioner's Brief):

"PEARSON, DANIEL, Judge, concurring in the denial of rehearing en banc.

If, as Judge Baskin's dissent suggests the child custody issue in this case was decided on a preference

for one religion over another, it is likely that we would all agree that the case would present a question of great public importance or a question of exceptional importance. But the child custody issue was not so decided, and, the rhetoric in the dissent aside, this case involves nothing more than the quite ordinary question of whether the trial court abused its discretion in resolving conflicting testimony unrelated to the religious practices of the partries [sic] about how the best interests of the child would be served.[1]

Although the denial of rehearing en banc reflects the considered conclusion that the trial court's decision was not based upon constitutionally impermissible grounds, it is worth observing that the mother never objected in the trial court to the evidence that she now says should not have been received and considered by the court; indeed, the mother was the very party who tried to make her religious practices the focal point of the dispute. The ordinary rules by which we operate—including one requiring that error be preserved for appellate review—are not suspended merely because the point on appeal is draped with the language of the First Amendment.

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[1]The record contains evidence, for example, that the child had difficulties beyond normal sibling rivalry with the mother's other child, an older stepbrother who resides with the mother; that the stepbrother may have been physically abusive towards the child; that the paternal grandmother was a good caretaker and the maternal grandmother was not; and that, to the child's detriment, the mother was absent from the house several nights each week.

HUBBARD, NESBITT and JORGENSON, JJ., concur."

REASONS WHY THE PETITION SHOULD BE DENIED

1. Failure to Raise and Preserve the Constitutional Question Below

Neither the pleadings at the trial level nor Petitioner's argument at the Appellate level contain any reference to a specific constitutional issue. Accordingly, the issue now presented for the first time, has been waived.

If Petitioner had, which she did not, referenced the "Constitution of the United States," it would have, nevertheless, been insufficient to preserve the question for consideration by this Court. (See *Herndon v. Georgia*, 295 U.S. 441, 442-443 (1935); *Harding v. Illinois*, 196 U.S. 78, 88 (1904); *Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 248 (1902)).

Jurisdiction in this Court requires the record below to demonstrate that the constitutional question was both raised and decided by the Florida Courts. (See *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919); *Beck v. Washington*, 369 U.S. 541, 550-54 (1962)). The arguments raised below did not mention or present the constitutional question.

Significantly, in cases such as the instant case, when the record fails to demonstrate that a federal question was raised and decided by the "highest Court" which could have ruled, counsel has the option to seek and obtain a certificate from that Court setting forth the conclusion that the federal question was in fact raised and decided (*Herb v. Pitcairn*, 324 U.S. 117, 128 (1945)). No such effort was made in this case.

2. The Decisions Below Are Grounded Upon

The decisions below were based upon a state ground consisting of the selection of the Respondent as the primary residential parent of the minor child of the parties in connection with a proceeding in the Florida Court involving a dissolution of marriage. No constitutional question was presented to the Trial or Appellate Courts. Even when there is a mixed question of state and federal rights, a state Court ruling resting on an adequate state ground is a sufficient basis for denying jurisdiction. (See Harv. L. Rev. 489, 501 (1977)). Accordingly, this Court should not grant Certiorari.

3. State Court Findings of Fact are Non-Reviewable

The Courts below resolved the questions presented based upon the standard of the best interests of the child and this Court will not reexamine those findings and conclusions of fact. (See *Grayson v. Harris,* 267 U.S. 352, 358 (1925); *Portland Ry. Co., v. Railroad Commission,* 229 U.S. 397, 412 (1913); *Fry Roofing Co. v. Wood,* 344 U.S. 157, 160 (1952)).

The arguments now advanced by Petitioner would necessarily require this Court to reexamine and engage in a *de novo* factual proceeding.

———o———

CONCLUSION

For these reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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MOTION AND BRIEF OF *AMICUS CURIAE* WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF *AMICUS CURIAE* WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., TO FILE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Watchtower Bible and Tract Society of New York, Inc., (Watchtower) hereby moves the Court for leave to file the accompanying brief *amicus curiae* in support of Petitioner's petition for writ of certiorari. Petitioner has given Watchtower written consent to file a brief *amicus curiae* but Respondent has not, thereby necessitating this motion. Copies of the letters showing Petitioner's consent and Respondent's refusal have been filed with the Clerk.

Watchtower Bible and Tract Society of New York, Inc., a not-for-profit religious corporation, is the parent

organization of the over 1,788,000 Jehovah's Witnesses and their associates in the forty-eight contiguous states. Petitioner is one of Jehovah's Witnesses. She has asserted that in a child custody dispute, speculation about the allegedly adverse effects of her religion on the cultural normalcy of her then-three-year-old daughter was the primary issue and resulted in a custody award to her ex-husband, the Respondent herein. Watchtower is therefore greatly interested in the religious freedom issues presented in this case.

As the parent organization of Jehovah's Witnesses in the United States, Watchtower has a broad perspective of the religious opposition faced by Witness parents in child custody and visitation disputes. From February 1987 to January 1988, Watchtower received inquiries from over 1,030 Jehovah's Witnesses in the United States who were facing religion-based attacks in child custody or visitation disputes.[1] Watchtower thus has a unique understanding of the extent of this problem for Jehovah's Witnesses.

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[1] The extent of this problem for Jehovah's Witnesses has been noted by others. One writer observed that "Jehovah's Witnesses seem to have been connected with over half the reported litigation" in which a parent's religion was attacked in a child custody dispute. 1 J. Atkinson, *Modern Child Custody Practice* § 4.35 (1986). Further corroboration is seen in a general annotation on the subject of religion in child custody and visitation cases. *See* Annotation, *Religion as a Factor in Child Custody and Visitation Cases*, 22 A.L.R.4th 971 (1983 & Supp. 1987). In this annotation, Jehovah's Witnesses are the only religious group to have a section devoted exclusively to cases involving members of their faith. *Id.* § 9.

For these reasons, Watchtower asks for this Court's leave to file its brief *amicus curiae.*

Respectfully submitted,

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Interest of *Amicus Curiae*

The interest of the Watchtower Bible and Tract Society of New York, Inc., is set forth in Watchtower's accompanying motion for leave to file this brief.

Statement of the Case

The decisive factor in the trial court's award of custody in this case was the Petitioner mother's 'deviant,' 'non-mainstream,' 'non-Western' religion. A19,

A21, A22, A23.[1] Despite the testimony of a psychiatrist and two psychologists (the "experts") that Petitioner's then-three-year-old daughter was extremely attached to her mother, A19, A20, A21; that there was no substitute for the relationship between the mother and the daughter, A21, A23, A24; that the mother was the child's primary parent figure, A19; that the mother was the one who, since the child's birth, had attentively cared for the child's physical and pyschological needs, A19, A21; and that leaving the child with the mother would have 'safeguarded what had already been working and proven to be a healthy relationship between the mother and her daughter,' A21, the trial court placed custody with the Respondent father, a man whose work regularly required him to be away from home. A21.

By the trial court's own words, *see* A3, A24-A25, its award of custody was based on the experts' testimony that, notwithstanding all their undisputed nonreligious evidence favoring the mother as the custodial parent, the mother's refusal to modify or compromise her 'deviant,' 'non-mainstream,' 'non-Western' religious beliefs rendered her less fit as a custodial parent than the father. A22, A23, A24. The Florida District Court of Appeal affirmed this award of custody because, in its view, the trial court did not abuse its discretion. A8. The District Court of Appeal implicitly found that the trial court's ruling was not contrary to the child's "best interests" and did not turn "solely" on the issue of the mother's

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[1] References are to the Appendix of Petitioner's Petition for Writ of Certiorari, *Mendez v. Mendez*, _ So. 2d _ (Fla. Dist. Ct. App. 1987), *petition for cert. filed*, 56 U.S.L.W. 3501 (U.S. Jan. 11, 1988) (No. 87-1166).

religion but rather was supported by "ample competent evidence." A8.

The assertion that the trial court's order was amply supported by nonreligious evidence and that religion was not the determinative factor ignores the fact that the mother's religion was by far the single major issue at trial. It also ignores the fact that the trial court expressly relied on the testimony of the experts in his award of custody, A3, A24-A25, notwithstanding the fact that all three experts and the guardian ad litem recommended or indicated that they would recommend the mother as the custodial parent provided she modify or abandon her religious beliefs. A20, A23, A24.

Reasons for Allowance of Writ

The central issue underlying the petition for writ of certiorari is the extent to which the First Amendment Religion Clauses allow courts to examine and rely on the religious beliefs of divorced parents when making awards of child custody or fixing conditions of visitation. For purposes of the petition for writ of certiorari, the basic issues are: (1) whether the court below, in deciding when and how the First Amendment allows a parent's religion to be a factor in custody and visitation disputes, has reached a result that conflicts with the decisions of other state courts of last resort; (2) whether the court below, in deciding when and how the First Amendment allows a parent's religion to be a factor in custody and visitation disputes, has decided important questions of federal constitutional law that have not been but should be settled by this Court; or (3) whether the court below, in deciding when and how the First Amendment allows a parent's religion to be a factor in custody and visitation disputes,

has decided questions of federal constitutional law in conflict with applicable decisions of this Court.

I.

State Courts of Last Resort Are in Conflict over the First Amendment Limitations on the Role of Religion in Child Custody Disputes

The Florida District Court of Appeal, a state court of last resort for purposes of the *Mendez* case, *see* FLA. R. APP. P. 9.030(a)(2)(A)(iv), has decided questions of federal constitutional law in conflict with the decisions of other state courts of last resort. The federal constitutional questions necessarily decided in *Mendez* were:

> (1) Does the Free Exercise Clause of the First Amendment prohibit a trial court from denying custody to a parent on the basis of that parent's religion when there has been no clear and affirmative showing of immediate and substantial harm to the child because of the parent's religion?
>
> (2) Does the Free Exercise Clause of the First Amendment prohibit a trial court from ordering a parent to suppress her religious activities in the presence of her child when there has been no clear and affirmative showing of immediate and substantial harm to the child because of the parent's religion?
>
> (3) Does the Establishment Clause of the First Amendment prohibit a trial court from making an award of child custody on the basis of religion when the child has no preference for any religion?
>
> (4) Does the Establishment Clause of the First Amendment prohibit a trial court from ordering a noncustodial parent to shield her child from all religions, including the noncustodial parent's, which are different from the custodial parent's religion, when the child has no preference for any religion?

The Florida District Court of Appeal's affirmance of an order denying custody and suppressing religious activity on the basis of one parent's religion when there has been no clear and affirmative evidence of immediate

and substantial harm to the child conflicts with the First Amendment free exercise protection construed by other state courts of last resort. *Osier v. Osier*, 410 A.2d 1027, 1030-31 (Me. 1980); *Hanson v. Hanson*, 404 N.W.2d 460, 463-64 (N.D. 1987); *Munoz v. Munoz*, 79 Wash. 2d 810, 813-15, 489 P.2d 1133, 1135 (1971); *see also Mentry v. Mentry*, 142 Cal. App. 3d 260, 190 Cal. Rptr. 843 (1983); *In re Marriage of Hadeen*, 27 Wash. App. 566, 619 P.2d 374 (1980).

In addition, the Florida District Court of Appeal's affirmance of an order awarding custody on the basis of religion and enjoining the noncustodial parent from 'exposing' her three-year-old child to any religious "practices, attendances, teachings or events . . . in any way inconsistent" with the custodial parent's religion when the child had no religious preference, A2, conflicts with Establishment Clause limitations construed by other state courts of last resort. *Bonjour v. Bonjour*, 592 P.2d 1233, 1241-44 (Alaska 1979); *Sanborn v. Sanborn*, 123 N.H. 740, 747-49, 465 A.2d 888, 893-94 (1983); *see also Zucco v. Garrett*, 150 Ill. App. 3d 146, __, 501 N.E.2d 875, 880 (1986).

In affirming the trial court's order, the Florida District Court of Appeal has contributed to the interstate confusion over the limitations, if any, the First Amendment places on trial courts when making awards of child custody or setting terms of visitation. Although all these courts supposedly observe the same federal constitutional standards, the federal constitutional protection afforded a parent's religious freedom in child custody and visitation disputes varies drastically from state to state. Es-

pecially if the parent is a member of a 'non-mainstream' religious minority, the extent of his freedom from court-imposed religious restrictions depends on his state of residence despite the presumably constant protection of the First Amendment.

An individual's federal constitutional rights should not hinge on a factor as inapposite and fortuitous as his place of residence. The conflicting, inconsistent results achieved by the state courts in their construction of the Federal Constitution's Religion Clauses in child custody and visitation disputes can only be set straight by this Court.

II.

The Court Below Has Decided Important Questions of Federal Constitutional Law that Have Not Been But Should Be Settled by this Court

The importance of religious free exercise and freedom from state advancement or suppression of particular religions needs no elaboration. Child custody cases such as *Mendez* bring the individual's religious freedom into the direct and immediate control of the state trial court judge. Under what circumstances, if any, does the First Amendment allow a trial court judge to deny a parent custody because of her religion? Under what circumstances, if any, does the First Amendment allow a trial court judge to restrain a parent's religious practices during visitation with her child? Under what circumstances, if any, does the First Amendment allow a trial court to favor one religion over another religion or no religion in a child custody dispute? These were the important federal constitutional questions necessarily decided by the Florida District Court of Appeal.

The United States Supreme Court has never addressed these questions in the setting of child custody or visitation, a setting in which state trial courts operate with wide-ranging discretion in pursuit of the child's "best interests." *Cf. Bellotti v. Baird*, 443 U.S. 622, 655-56 (1979) (Stevens, J., concurring) (best interest standard "provides little real guidance to the judge"). When and how this often highly subjective pursuit is tempered by the commands of the Federal Constitution are questions peculiarly suited to the mission of this Court.[2] If fundamental rights guaranteed to all persons by the Federal Constitution are being needlessly violated out of a reverance for the child's "best interests" that ignores First Amendment principles, this Court should correct the error.

III.

The Court Below Has Decided Questions of Federal Constitutional Law in Conflict with the Applicable Decisions of this Court

Although this Court has never ruled on Free Exercise and Establishment Clause questions in the context of child custody or visitation, there is no lack of guidance from the analysis the Court has applied in many First Amendment religion cases. The decisions of this Court show that an individual's right of religious free exercise is a fundamental constitutional right that precedes any

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[2] This is especially so in view of the "domestic relations exception" to the jurisdiction of the lower federal courts. *See In re Burrus*, 136 U.S. 586 (1890). *See generally* 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3609, at 477-80 (1984).

interest of the state.[3] Any state-imposed burden on this fundamental right is subject "to strict scrutiny and [can] be justified only by proof by the State of a compelling interest." *Hobbie v. Unemployment Appeals Commission*, 107 S. Ct. 1046, 1049, 94 L. Ed. 2d 190, 197-98 (1987). Even upon proof of a compelling state interest, the state can justify an inroad on religious liberty only by showing that it is the least restrictive means of achieving the state interest. *Thomas v. Review Board*, 450 U.S. 707, 718 (1981).

While the state certainly has a compelling *parens patriae* interest in the welfare of children caught in the midst of custody disputes, *cf. Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972), invocation of the child's "best interests" does not mean First Amendment free exercise analysis requiring strict scrutiny and least restrictive means is abandoned. If a trial court's pursuit of the child's "best interests" burdens a parent's free exercise of religion, the court's actions must satisfy the rigors of free exercise analysis.

> Where the state conditions receipt of an important benefit . . . because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Board, 450 U.S. 707, 717-18 (1981).

The "important benefit" controlled by the state in the *Mendez* case was a nurturing mother's custody of her

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[3] The First Amendment Free Exercise Clause applies to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

three-year-old daughter. To condition the receipt of such an "important benefit" on a parent's "willingness to violate . . . cardinal principle[s] of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

There can be no question in the *Mendez* case that the state placed a heavy burden on Rita Mendez's free exercise of religion. Rita was forced to choose between following her religion, and thereby forfeit the custody of her child, or abandoning her religion, and thereby gain the custody of her child. "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against" members of 'non-mainstream' religious minorities. *Id.* at 404. By denying Rita Mendez the custody of her child because she would not abandon, modify or compromise her 'deviant,' 'non-mainstream,' 'non-Western' religious beliefs, the trial court used its state-given power to exact a dear price for religious freedom.

Since everyone agrees that the welfare of minor children is a state interest of the highest order, the real question is not whether the state's interest is compelling but whether a parent's religious beliefs and practices actually threaten that state interest. This is where the court below erred; it failed to apply the strict-scrutiny and least-restrictive-means analyses required by this Court's First Amendment Free Exercise Clause decisions. In awarding custody to Rita Mendez's ex-husband, the trial court relied on mental health experts' hypotheses about vague and distant "adverse" effects Rita's three-year-old daughter might suffer because of Rita's 'deviant,' 'non-mainstream,' 'non-Western' religion. Does the state have a compelling *parens patriae* interest in ensur-

ing a "mainstream," "Western," 'non-deviant' upbringing for the children of divorced parents? If so, is total suppression of a noncustodial parent's religious free exercise during visitation the least restrictive means of protecting that state interest?

But for their unfavorable opinions about Rita Mendez's religion, all the mental health experts and the guardian ad litem agreed that Rita should have been made the custodial parent. While the experts were entitled to their private opinions and prejudices about Rita's religion, the trial court, acting on behalf of the state, was not free to adopt such speculative, discriminatory thinking behind the broad discretionary veil of the child's "best interests." As this Court said in a child custody case in which the trial court adopted the private racial prejudice of one of the parties:

> The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held."

Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (quoting *Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (White, J., dissenting)). The same should apply to private religious prejudice even when presented in the guise of "expert" testimony.

From the Establishment Clause[4] side of the question,

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[4] The First Amendment Establishment Clause applies to the states through the Fourteenth Amendment. *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

the court below failed to apply this Court's well-settled Establishment Clause analysis before it affirmed a custody order that favored the religion of one parent over that of the other. What secular purpose, having an effect that neither principally nor primarily advances nor inhibits religion, and that does not foster excessive entanglement with religion, is accomplished by an award of custody based on a parent's religion when a child is too young to have any religious preference? *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *cf. Bonjour v. Bonjour*, 592 P.2d 1233, 1240 n.14 (Alaska 1979); *Munoz v. Munoz*, 79 Wash. 2d 810, 815, 489 P.2d 1133, 1136 (1971); *Wojnarowicz v. Wojnarowicz*, 48 N.J. Super. 349, 354, 137 A.2d 618, 621 (1958). Unless speculation about the advantages of a parent's "Western," "mainstream," 'non-deviant' religion to a child who has no religious preference suffices as a valid secular purpose, the award of custody in *Mendez* patently served a purpose that was primarily religious.

In addition, a religion-based award of custody unavoidably has a principal effect of advancing the religion of one parent while inhibiting the religion of the other. "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). The signal from *Mendez* to parents preparing for custody disputes is to abjure any association with 'non-mainstream,' 'non-Western,' 'deviant' religions and to present the court with the most wholesome, all-American religion they can come up with.

Finally, excessive entanglement with religion cannot possibly be avoided in a quest to establish which parent practices the more "mainstream," "Western," 'nondeviant,' and, therefore, more 'beneficial' religion. The transcript of the *Mendez* trial provides a sorry but illustrative example of the type of religious inquisition necessitated by such a quest. And once the 'harmful' and 'beneficial' features of the parents' religions have been adequately established, the court must continue its religious entanglement by means of an enforceable order that will 'protect' the child from the deleterious effects of the noncustodial parent's religion.

In *Mendez*, the court ordered:

> The Wife shall not expose or permit any other person to expose the minor child to any religious practices, attendances, teachings or events which are in any way inconsistent with the religious teachings and practices of the Catholic religion. Nor shall the wife preclude the child from engaging in any activity which is permitted by the Catholic religion.

A2-A3. How will the court enforce this order unless it knows what the practices, attendances, teachings, events, and activities of the Catholic religion are? A threshold difficulty in gaining such knowledge is determining what is meant by "the Catholic religion." Does this mean Catholic doctrine as articulated by the Pope, does it mean the teachings of the American Catholic church, or does it mean the beliefs of the many people who consider themselves good Catholics but who disagree with both the Pope and American church leaders on what they believe God expects of them? The differences between the Papacy, the American Catholic church, and the average American Catholic are substantial. This is simply one aspect of the entanglement engendered by the *Mendez* order.

Without applying basic Free Exercise or Establishment Clause analysis, the court below has affirmed a custody order that burdens Rita Mendez's religious freedom and advances a particular religion for no secular purpose. The Florida District Court of Appeal has thereby made decisions of federal constitutional law in conflict with the applicable decisions of this Court.

Conclusion

Amicus curiae Watchtower Bible and Tract Society of New York, Inc., urges this Court to grant the writ of certiorari and address the serious invasions of First Amendment rights typified by the award of custody in this case.

Respectfully submitted,

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February 1988

No. 87-1166

In The

Supreme Court of the United States

October Term, 1987

RITA L. MENDEZ,

Petitioner,

vs.

IGNACIO MENDEZ,

Respondent.

On Writ of Certiorari to the Florida District Court of Appeal, Third District

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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JURISDICTION: THE FEDERAL QUESTION WAS RAISED.

The record in this case belies the Respondent's assertion that the Petitioner "never presented" the constitutional issues raised herein to "a Florida court". Indeed, the Respondent's "Brief in Opposition", by quoting the concurring opinion of Judge Daniel Pearson of the Florida District Court of Appeal, establishes on its face that the issue was raised. If, as the Respondent claims, the Petitioner "never" raised a constitutional issue, how was the author of that concurring opinion able to conclude that "the trial court's decision was not based upon constitutionally impermissible grounds"?

Quite to the contrary of the Respondent's contentions, the Petitioner's argument in the District Court of Appeal was premised upon the lower court's abuse of discretion in basing its custody determination upon a constitutionally impermissible ground—her religion. The Petitioner opened the argument portion of her "Initial Brief" to the District Court of Appeal by citing the Missouri case of *Waites v. Waites*, 567 S.W.2d 326 (Mo. 1978) and, quoting that decision, asked:

> [W]hat role, if any, can the factor of religion play in the judicial resolution of a child custody dispute consistent with the framework of our federal and state constitutions?

Thereafter, the Petitioner discussed, in detail, a series of state court decisions all of which cases, and the discussion thereof, dealt with the question of the "constitutionality" of a trial court's reliance upon the religion of one of the parents as a factor in a child custody dispute.

Simultaneously with the filing of the Petitioner's "Initial Brief" in the District Court of Appeal, the American Civil Liberties Union Foundation of Florida, Inc. (ACLU) filed a "Motion for Leave to File Brief as Amicus Curiae" in support of the position of the Petitioner. The ACLU requested permission to appear as amicus for the express purpose of:

> [H]ighlight[ing] the constitutional issues raised by the trial court's order which implicate fundamental rights safeguarded by the First and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 2, 3 and 9 of the Florida Constitution.

The District Court of Appeal, "upon consideration" of the motion, granted permission to the ACLU to file a brief as amicus curiae and, later, to participate in oral argument. The brief submitted to the District Court by the amicus contained the following argument:

> IN A CHILD CUSTODY PROCEEDING DEVOID OF EVIDENCE THAT THE RELIGION OF THE WIFE WAS INIMICAL TO THE WELFARE OF THE PARTIES' MINOR CHILD, THE TRIAL COURT ERRED BY DENYING CUSTODY TO THE WIFE SOLELY BECAUSE SHE IS A JEHOVAH'S WITNESS, IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Respondent, who now asserts that no "references" to any constitutional issues were made below, responded to the Petitioner's arguments on appeal by stating the following:

> [The Petitioner's] argument, when reduced to its essentials is: the Court below erred because it based its decision on a choice of religion as opposed to what is in the best interest of the child.
>
> * * *
>
> Significantly, the religious needs of a child can be considered and a statute which so provides is not unconstitutional on its face.
>
> * * *
>
> When [the Petitioner's] argument is carried to its logical extension, it could be said that a decision awarding custody of the child to the Wife would violate the Father's rights and unconstitutionally deny his right to freedom of religion.
>
> * * *

It is important that it be demonstrated to the Court that the religious rights of the Mother are in no way infringed upon by the ruling of the Court.

If, as the Respondent claims, "no constitutional question was presented below" and the issue is "now presented for the first time", why did the Respondent find it necessary to discuss below the "constitutionality" of the trial court's consideration of religion in this case?

The opinion of the District Court of Appeal[1] directly addressed the constitutional issues raised by the Petitioner by holding:

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[1]Contrary to the Respondent's claim that Petitioner was able to seek review in the Florida Supreme Court, the opinion of the District Court of Appeal, although clearly addressing the constitutional issues raised by the Petitioner, did not afford the opportunity to seek discretionary review in the Florida Supreme Court. The jurisdiction of the Florida Supreme Court is restricted to decisions which "expressly construe a provision of the state or federal constitution." Rule 9.030(a)(2)(A)(ii), Florida Rules of Appellate Procedure. "Expressly," in this context, means "within the written district court opinion". *School Board of Pinellas County v. District Court of Appeal,* 467 So.2d 985 (Fla. 1985). An opinion does not "construe" a provision of the constitution unless it "undertakes to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision". *Ogle v. Pepin,* 273 So.2d 391 (Fla. 1973). The Petitioner attempted to seek review in the Florida Supreme Court by the only method available to her: she filed a "Suggestion for Certification" asking that the District Court "certify" the case to the Florida Supreme Court as one of great public importance. The Petitioner's basis for seeking certification was that "the importance of this case lies in the need to resolve a question of *constitutional proportions,* specifically, whether and under what circumstances may the religious beliefs and values of parents in a child custody case be considered as a 'factor' aiding the court in its child custody determination?" The Petitioner's request for certification was denied by the District Court of Appeal. (Emphasis supplied)

> The record in this case does not support the [Petitioner's] contention that the trial court made the [Respondent] the primary residential parent of the parties' minor child solely because the [Petitioner] is a practicing Jehovah's Witness. Instead, the record reflects that the trial court, after considering the testimony of numerous experts, the parties and their relatives and friends, and a guardian ad litem appointed to represent the minor, considered, as it had a right to do, *Rogers v. Rogers*, 490 So.2d 1017 (Fla. 1st DCA 1986), the effect on the child caused by the conflicting religious beliefs of the parents and, in ruling, conscientiously avoided any interference with the right of the non-custodial parent to practice her religion and avoided the imposition on her of an obligation to enforce the religious beliefs of the [Respondent].

The Petitioner sought rehearing and rehearing en banc on four grounds, two of which were the following:

> The trial court did not "conscientiously avoid" any interference with the right of the non-custodial parent (the Mother) to practice her religion but, rather, the trial court expressly and specifically prohibited the Mother from "expos[ing] the minor child to any religious practices, attendances, teachings or events which are in any way inconsistent with the religious teachings and practices of the Catholic religion". This restriction upon the Mother places her in the anomalous position of having a *constitutional right* to express her religious views to complete strangers, but not to her own child. (Emphasis supplied)
>
> * * *
>
> The panel opinion relies upon the decision of *Rogers v. Rogers*, 490 So.2d 1017 (Fla. 1st DCA 1986) which, by holding that a trial court may consider "religious beliefs and values" in a child custody case with no

> further limitation upon the circumstances under which such consideration may take place, is *unconstitutional.* (Emphasis supplied)

The Petitioner's request for rehearing and rehearing en banc was denied in divided opinions, the contents of which raise yet another question: If, as the Respondent claims, the Petitioner "did not mention or present [a] constitutional question", why did seven of the nine judges comprising the Florida District Court of Appeal find themselves compelled to discuss the constitutional issue in the several concurring and dissenting opinions on rehearing en banc?[2] Clearly, the constitutional issues presented by this case were raised below and the Respondent's contentions to the contrary are disingenuous at best.

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[2]Judges Pearson, Hubbart, Nesbitt and Jorgenson concurred in the denial of rehearing en banc upon the express basis that "the trial court's decision was not based upon *constitutionally impermissible grounds*". Judges Baskin and Ferguson dissented from the denial of rehearing en banc because "the trial court's *curtailment of first amendment rights* should compel the court to recognize the presence of issues of great public importance and grant en banc relief or, at a minimum, certify the following question as one of great public importance: whether, and to what extent, may a trial court base its decision to award child custody on the religious beliefs and practices of one of the parents?" Chief Judge Alan R. Schwartz dissented from the denial of rehearing en banc upon the basis that, "the record in this case presents a substantial question concerning the interplay between the best interests of the child in a custody case and a parent's religious practices of which the judge may personally disapprove or find distasteful. The importance, indeed *the constitutional necessity,* of drawing an impenetrable line between the two factors in every case in which there is no demonstrable harm to the child . . . and the real possibility . . . that the line was improperly crossed below, render it clearly appropriate that this case be determined en banc as one of great public importance". (All emphasis supplied)

THE RESPONDENT'S ARGUMENT: ECHOES OF PALMORE V. SIDOTI.

The Respondent's argument that the custody of the child in this case was decided on an "adequate state ground" and upon factors other than the religion of the child's mother echoes the argument of the respondent in *Palmore v. Sidoti,* 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984)—an argument unanimously rejected by this Court.

Like the respondent in *Palmore,* the Respondent here attempts to portray the Florida court's decision as being based on factors other than those which are constitutionally impermissible. The Respondent claims that "there was substantial, voluminous and impressive testimony presented to the trial court with respect to the parenting abilities of the Father". In fact, there was no such testimony, and the Respondent's complete failure to set forth even one example of the so-called "substantial, voluminous and impressive" testimony speaks for itself.[3]

Contrary to the Respondent's position, this case was not decided in the "best interest" of the child. If it had been, the child would now be with her mother, the Petitioner, the child's "nurturing mother", "prime parent figure" and "psychological parent". There can be no greater proof of the true basis of the custody decision here than the fact that, in one breath, the trial judge

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[3]Also akin to *Palmore,* the Respondent here restates the questions presented to this Court in an obvious attempt to "deemphasize the significance of the [constitutional issue] by suggesting it was only one of several factors involved in the Florida court's decision". See Silverberg and Jonas, *Palmore v. Sidoti: Equal Protection and Child Custody Determinations,* 18 Family Law Quarterly 335, 335 (Fall 1984).

termed both the Petitioner and the Respondent "fit and proper" parents and, in the next, awarded custody of the child to the Respondent and forbade the Petitioner from "exposing" the child to her religious beliefs. To deprive a mother of her child because she worships a God named Jehovah is repugnant to the Constitution. Only this Court can remedy this injustice.

CONCLUSION

For the reasons set forth herein and in the Petition for Writ of Certiorari, it is respectfully submitted that a writ of certiorari should issue to review the judgment of the Florida District Court of Appeal, Third District.

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